

Sharifi (Migration) [2019] AATA 2741 (24 May 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Ali Sharifi
VISA APPLICANTS:	Mrs Masooma Sharifi Ms Mahtab Sharifi Mr Amir Kumail Sharifi Ms Negin Sharifi
CASE NUMBER:	1701939
DIBP REFERENCE(S):	2013102809 OSF2013/102809
MEMBER:	Mary Urquhart
DATE:	24 May 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named applicant and the secondary applicants meet the following criteria for Subclass 309 (Spouse (Provisional)) visas: • Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations. • • Statement made on 24 May 2019 at 3:07pm •

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – bogus document – Afghan tazkiras – not registered with the Afghan Government authorities – waiver of requirement – compassionate or compelling circumstances – interest of an Australian citizen – separation from wife and children – impact on the sponsor – psychologist report – anxiety, depression and insomnia – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 309.225, Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 January 2017 to refuse to grant the applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 11 December 2013. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the visa applicants had provided bogus documents (tazkiras which were bogus documents) to the Department and therefore did not meet the requirements of Public Interest Criterion (PIC) 4020. Further the delegate found that there were not sufficiently compelling or compassionate reasons to justify waiver of the PIC 4020 criteria.
6. The review applicant (the sponsor) appeared before the Tribunal on 24 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone from Pakistan. The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages.
7. The review applicant was represented in relation to the review by his registered migration agent.
8. Prior to the hearing the Tribunal received further documentation in support of the application including a second report from Mr Randolph Monteiro, Psychologist/Clinical counsellor, Med, ED.and Dev.Psychology, dated 21 May 2019.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the primary visa applicant, (the applicant) and the secondary applicants meet Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visas. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted

or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The history of the matter is as follows. In support of visa applications the primary visa applicant Mrs Masooma Sharifi (the applicant) submitted Afghan tazkiras obtained in Pakistan, in support of her identity and the identity of the secondary applicants. The Department sent the documents, registration numbers 858752 (Masooma Sharifi) 858747 (Mahtdb Sharifi), 858746 (Amir Kumail Sharifi) and 858751 (Negin Sharer) for verification by the relevant Afghan Government registration authority. Handwritten passport documents were also submitted. These were not sent for verification.
16. On 16 June 2016 this office received notification that Afghan tazkira registration numbers (as above), were all found not to be registered with the Afghan Government authorities and therefore the documents were found to be 'fake and bogus'.
17. The department file reveals that on 9 August 2016 the visa applicant was afforded natural justice and invited to comment on the adverse findings regarding the provision of bogus documents, namely tazkiras for herself and the 3 secondary applicants.
18. A response was provided on behalf of the applicants on 25 August 2016.
19. The evidence is that the applicants subsequently obtained new tazkiras. However the Tribunal notes that the Public Interest Criterion 4020 policy advice states that there is no provision for an applicant to "correct" the giving of a bogus document.
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21. The Tribunal notes the evidence that the disputed documents were obtained by the applicant from the Afghan Embassy in Quetta, Pakistan. It was submitted that the visa applicant is an uneducated woman who presented the documents to the department in good faith. She claims she later went to Afghanistan and obtained new documents from the Afghan authorities there.
22. The Tribunal notes the content of the disputed documents is the same as the later documents.
23. It was submitted that an Afghan national such as the visa applicant should be able to rely on the service she claims was provided by her own Embassy, as representing the State of Afghanistan. It was submitted it would be different if the documents were obtained from an illegal source, such as a counterfeiter, but that is not what happened. The applicant gave evidence that she and many others approached the Afghan Embassy in Quetta to obtain documents. She believed they were legitimate.
24. After careful consideration of the evidence and submissions the Tribunal finds substantial weight must be given to the tazkira verification results from the Afghanistan issuing authorities, which indicated that tazkira nos. 858752, 858747, 858746, and 858751 initially, submitted by the applicants, are bogus documents. The documents were found not to be registered with the Afghan Government authorities. Therefore the documents were found to be 'fake and bogus'.
25. On the basis of the evidence before it, the Tribunal finds that the visa applicant gave bogus tazkira documents to the Department in support of the applications.
26. Therefore, the applicant does not meet PIC 4020(1). As a bogus document or information that is false or misleading has been provided during the course of the current application, the Tribunal finds the applicants have not met PC 4020(1) and as a result the applicants do not satisfy regulation 309.225.
27. **Waiver consideration**
28. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
29. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:
 - family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - that family members in Australia would be left without financial or emotional support; and
 - a parent in Australia would be separated from their child.
30. The Tribunal has considered all of the circumstances of this case, and for the following reasons, is satisfied that the requirements should be waived.

31. The sponsor is the relevant Australian citizen and he contends that there are compassionate or compelling circumstances that affect his interests that warrant a waiver of PIC 4020.
32. The Tribunal has carefully considered the information submitted by the migration agent on behalf of the sponsor and notes in particular submissions specifically seeking a PIC 4020 waiver on the basis of compelling and compassionate circumstances as detailed in the sponsor's evidence.
33. The sponsor gave evidence to the Tribunal about the fact that he has three children who he has had very limited contact with and the effect that his separation from them, during their formative years of life, is having on him emotionally, mentally and physically. The review applicant told the Tribunal that his oldest child was 4 when he left for Australia. She is now 14. His second child is 11. He said he had hoped to provide a better life and education for them away from persecution and insecurity. They have been waiting to be reunited with him for some 10 years.
34. In particular the Tribunal has considered the sponsor's claims regarding the impact on him should he continue to be separated from his family, including the psychological evidence now before the Tribunal of the impact he has already suffered.
35. The sponsor explained that his concern for his family and his distress at being separated from his family is making it increasingly difficult for him to concentrate at work.
36. The Tribunal accepts the evidence that the sponsor was a recognised refugee prior to obtaining his Australian citizenship. His original country of residence, Afghanistan, being a war zone. It was submitted that he cannot realistically live there with his family, or in Pakistan, where there are significant similar issues of instability and oppression of Hazara people.
37. The Tribunal notes the delegate in his decision on 17 January 2017 considered the impact on the sponsor of separation from his family and found the sponsor's circumstances did not have a compelling or compassionate element beyond those "usually present in the partner caseload". Since then some further 2 years have passed adding further negative impact to the sponsor's well-being.
38. The Tribunal has carefully considered the two reports of Mr Randolph Monteiro, Psychologist and Clinical Counsellor. The most recent dated 21 May 2019. He indicates he has been treating the sponsor since February 2017. He identifies the sponsor as suffering symptoms of anxiety, depression and insomnia. He refers to the sponsor experiencing social withdrawal and indicates he is suffering due to fearfulness about his family. He describes the sponsor as suffering from a "chronic fear marked by low-esteem" which affect his psychological state. On 18 May 2019 he tested the level of Depression suffered by the sponsor in accordance with the Beck Depressive Inventory FastScreen for Medical Patients (BDI-PC). The results of the testing place the sponsor's depression in the severe range. The Tribunal gives weight to this evidence.
39. The Tribunal accepts that the sponsor's separation from his wife and children has severely impacted him both emotionally and mentally due to having been separated from them for an extended period. The Tribunal notes the application was lodged in December 2013. The Tribunal accepts he is suffering from a significant level of stress.
40. The Tribunal accepts the sponsor has significant concerns for his family in Quetta and their circumstances there. The Tribunal accepts the evidence of Mr Monteiro as to the effect on the sponsor of separation from his family. Mr Monteiro indicates that if the sponsor's

condition were relieved by being reunited with his wife and children it would greatly enhance his ability to work and would have a positive effect on his mental well-being.

41. The Tribunal notes, as discussed above, the Explanatory Statement identified a parent in Australia being separated from their child as an example of the type of circumstance that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020.
42. If the visa applicant is not granted the visa, the sponsor faces a further extended period of separation from his young children and his children will also face continued separation from their father. The Tribunal accepts on the evidence before it that this would be detrimental to the sponsor's mental health and may impact his employment. As such, the Tribunal finds that the continuation of these circumstances constitutes compassionate circumstances that affect the interests of an Australian citizen and justifies the granting of the visa.
43. Therefore the requirements of PIC 4020(1) should be waived.
44. Public Interest Criterion 4020(2) requires the Tribunal to be satisfied that the visa applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC4020(1) in the period commencing three years before the application was made to the present.
45. There is no evidence before the Tribunal that the visa applicant and each member of the family unit have been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing three years before the application was made to the present.

46. Has the applicant satisfied the identity requirements?

47. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The visa applicant has provided the Department with new tazkiras and machine readable zone passports issued in Kabul, Afghanistan.
48. The Tribunal is satisfied that the applicants meet PIC 4020(2A).

49. Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

50. PIC 4020(2B) requires that neither the visa applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the application is granted or refused.
51. There is no information before the Tribunal to suggest that the visa applicant or any family unit member has been refused a visa because of a failure to satisfy the identity requirements in PIC 4020 (2A) during the period starting 10 years before the application was made and ending when the application is granted or refused. The visa applicant therefore satisfies PIC 4020(2B).
52. Therefore the visa applicant meets PIC 4020(2B).
53. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.309.225.

DECISION

54. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named applicant and the secondary applicants meet the following criteria for Subclass 309 (Spouse (Provisional)) visas:
- Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations.

Mary Urquhart
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...